Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	]	
	]	
Examination of Current Policy Concerning the Treatment of Confidential Information	]	GC Docket No. 96-55

To: The Commission

REPLY COMMENTS OF JAMES A. KAY, JR.

James A. Kay, Jr. ("Kay"), by his attorney and pursuant to Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), Section 1.415(c) of the Commission's Rules and Regulations, 47 C.F.R. § 1.415(c), hereby offers his reply comments.[1]

The vast majority of the parties submitting comments are in agreement that the increasingly competitive nature of the telecommunications industry raises special concerns regarding the treatment of confidential and competitively sensitive information submitted to the Commission. This is especially true when competitors in the marketplace are not necessarily subject to the same regulatory requirements at the Commission. As one group of commenters so aptly stated, "A party should not be placed at a competitive disadvantage, or be required to forego valuable trade secrets, as a condition to becoming a Commission licensee."[2] To be sure, there are statutory provisions, if not legitimate public policy reasons, for affording public access to information collected and held by regulatory agencies. But it would be naive for the Commission to fail to account for the reality that all businesses will fully exploit (and some will abuse) any opportunity afforded them by the regulatory process to obtain competitively sensitive information. If the Commission is sincere in its stated goal of increasing and preserving

[1] Several parties filed comments on the *Notice of Inquiry and Notice of Proposed Rulemaking* (FCC 96-109; released March 25, 1996), as follows: Cincinnati Bell Telephone Company; GTE Service Corporation; The Law Office of Alan Lurya; MCI Telecommunications Corporation; National Cable Television Association; SBC Communications, Inc.; Sprint Corporation; Thompson Hine & Flory, Time Warner Communications Holdings, Inc.; and joint comments of Ameritech; The Bell Atlantic Telephone Companies; Bell Communications Research, Inc.; BellSouth Corporation; NYNEX Corporation; Pacific Bell and Nevada Bell; and US West, Inc.

[2] Joint Comments of Ameritech, et al., at pp. 2-3.

competition in the telecommunications marketplace it its imperative that its regulations regarding treatment of sensitive business information not inadvertently undermine its efforts.

In these reply comments, Kay will briefly address three important issues discussed by one or more of the various parties in their comments: (1) the distinction between voluntary and compulsory submissions, (2) the question of who has the burden in determinations of confidentiality versus disclosure, and (3) the timing of any required justification for requests for confidential treatment.

The Distinction Between Voluntary and Compulsory Submissions.

Under current rules and practices, information that is submitted to the Commission voluntarily is governed by a different standard and subject to different requirements than information required by the party to be submitted to the Commission. This affects not only the standard by which claims of confidentiality are evaluated, but also the physical treatment of the submitted information. Thus, if information is submitted voluntarily with a request for confidentiality, and the request is denied, the information is returned to the submitting party. If on the other hand, the information is required to be submitted to the Commission, the information becomes available to the public if a request for confidentiality is denied.

There are any number of problems with this arrangement. The mere fact that the submission of the information was required by Commission rule or directive should not be determinative of its treatment. Private parties may purposely initiate proceedings, both formal and informal, that will result in the required submission of potentially confidential information. Formal complaints are but one example.[3] Regardless of the rubric under which the Commission

[3] The situation experienced by Mr. Kay (*see* footnote 2 of Kay's initial comments) involved informal complaints in which neither the identity of the parties nor the specific content and nature of their complaints were disclosed to Mr. Kay. As it turns out, these secretive parties were Mr. Kay's competitors. Nonetheless, Mr. Kay was expected to submit information with no adequate assurance of confidential treatment. Private parties must not be permitted to use the Commission as a "go-between" to obtain confidential information about their competitors. It is entirely inappropriate for private parties, on an *ex parte* basis, to influence the Commission staff in collecting highly sensitive information from competitors under the guise of "informal complaints" and "enforcement" actions. Whenever the Commission requests confidential business information, it should disclose (a) the reason the requested information is required, and (b) the identity of any private third parties whose complaints, requests, or other communications, formal or informal, have prompted the request

requests information, the submitting party should not be placed in the dilemma of choosing between two forms of suicide, one regulatory if it fails to surrender the information the Commission requests, or the other commercial if the information becomes available to its competitors and business enemies.

Burden of Justifying Confidentiality or Disclosure.

The parties are divided as to whether (a) the party seeking access to confidential records and information should have the burden of justifying their disclosure, or (b) the party opposing disclosure has the burden of demonstrating entitlement to continued confidential treatment. There is probably no single objective standard that can be applied across the board, and such issues are probably better decided on a case-by-case basis under a rule of reason. In an increasingly competitive environment, however, the Commission must be sympathetic to the sensitive nature of business information. Kay recommends that two factors should have prime importance in determining burden issues: (1) the nature of the information at issue, and (2) the relationship between the parties seeking disclosure or access to the party requesting confidentiality.

If the information relates in any way to the economic and business aspects of the submitting party's commercial enterprise, and is information of the sort that would not normally be publicly disclosed in the absence of a regulatory requirement to do so, there should be strong presumption in favor of confidential treatment and parties seeking access to or disclosure of such information should have the burden of overcoming that presumption. Moreover, the presumption of confidentiality and the high burden should not turn on whether the information would be entitled to "privileged" treatment in a formal legal proceeding—it should be sufficient that the information relates to the business activities of the submitting party and is potentially competitively sensitive. A narrower standard might have been appropriate in prior times of greater regulation and less competition, but the regulatory policy of today favors open entry and free competition. The Commission should not allow its process to defeat competition by giving competitors inappropriate access to each other's private information.

For the same reasons, the burden of overcoming a presumption of confidentiality should be much higher for someone who is a competitor of the party who submitted the information When a request is made for access to information that is not generally available to the public and when that information has been submitted by or collected from a private party, the person making the request should be required to state its competitive relationship, if any, to the party who submitted the information. If the two parties have a direct or indirect competitive relationship, the party seeking access or disclosure should face a very high burden of overcoming the presumption of confidentiality

Timing of Demonstrations and Justifications.

Some of the commenters also addressed the question of when a request for confidential treatment should be justified, i.e., must the submitting party make a full justification of a request for confidential treatment at the time the information is initially submitted, or may some or all of the justification be deferred until such time as access to or disclosure of the information is requested? Kay recommends that showings and justifications in support of a request for confidential treatment be deferred until a dispute arises The information can be submitted with a request for confidential treatment and a brief threshold showing that it is entitled to such treatment. Unless the request appears on its face to be specious, there is no reason not to honor it until such time as it is challenged, i.e., until a third party seeks access to or disclosure of the information.

By deferring such justifications, the Commission can thus avoids unnecessary submissions and regulatory determinations in situations where access to the information is never sought. When access is requested, on the other hand, the showings can be tailored to meet the circumstances. The nature of the showing or justification will vary depending on the scope of access sought (ranging from limited access to part of the information to full public disclosure of all information), the identity of the party seeking access or disclosure (i.e., whether or not such party stands to enjoy private gain as a result of access to the information), and other factors Moreover, there may be no objection to disclosure depending on the timing of the request because information submitted today as confidential may not be competitively sensitive a year or

two from now. In short, deferring the showings and justifications for confidential treatment and/or access or disclosure of information is a much more efficient regulatory approach.

WHEREFORE, it is requested that the Commission give full consideration to these reply comments and adopt the proposals contained therein and those contained in Kay's initial comments.

Respectfully submitted,

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